

The Merciful Capital Juror

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We examine the role of mercy in capital sentencing along three dimensions. We first explain why mercy is a philosophically problematic virtue, and second, why it presently holds an ambiguous status within constitutional doctrine. Finally, we draw on interviews with jurors who served on capital cases in order better to understand how the behavior of merciful jurors compares to the behavior of their less merciful counterparts. Among other things, we find that merciful jurors tend to be better educated and to attend religious services regularly. We also find that merciful jurors are, as one might reasonably expect, more apt to vote in favor of a sentence of life imprisonment instead of death.

INTRODUCTION

Imagine you are a juror sitting on a capital trial. The defendant takes the stand and begs you to have mercy on him. Should you? Can you? Will you? These three questions reflect three distinct problems surrounding the role of mercy in capital sentencing:

First, mercy is *philosophically problematic*: We usually think of mercy as a virtue, but mercy means imposing less punishment than an offender deserves, and less than similarly-situated defendants receive. Mercy therefore conflicts with equal justice. *Should* you show mercy?

Second, mercy occupies a *constitutionally ambiguous* status: Are states constitutionally required to give jurors the freedom to be merciful? Or may they deny them that freedom? *Can* you show mercy?

Third, mercy is *empirically obscure*: Do the merciful find their way onto capital juries? If they do, do they actually behave any differently than their less merciful—or merciless—counterparts? *Will* you show mercy?

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We address these three problems below. We reach no resolution on the first two. Instead, we try simply to show that mercy is indeed both philosophically problematic and constitutionally ambiguous (Parts I and II). Our main purpose is to make headway on the third problem (Part III), casting some light on a subject hitherto empirically obscure: the influence of mercy on the mind and behavior of the capital juror.¹ Readers concerned less with the philosophical problematics of mercy, or with the ambiguities surrounding its constitutional status, may safely bypass Parts I and II and head straight for Part III.

Using data from the Capital Jury Project,² we examine in Part III how the merciful capital juror thinks, feels, and behaves. We begin with the creation of a scale intended to measure a capital juror's disposition to be merciful. We then use that scale to assess how, if at all, a merciful capital juror's thoughts, feelings, and deliberations differ from those of less merciful jurors; to identify which, if any, demographic characteristics, such as race, sex, or age, are associated with a juror's tendency to be merciful; and finally, to determine if, as one might reasonably expect, a merciful capital juror is in fact less inclined, all else being equal, to vote for death than is a merciless one.

We find, among other things, that some jurors are indeed more mercifully disposed than others. Such jurors tend to be among those who are better educated, and who attend religious services with regularity. Moreover, we find that merciful jurors are in fact more likely, all else being equal, to vote for life instead of death, at least on the first ballot.

I. THE PHILOSOPHY OF MERCY

Who could object to mercy? After all, mercy, so it's commonly believed, is a virtue, a moral good, and what could be wrong with that? According to some, however, mercy is at best a paradoxical virtue; at worst, it's a vice. The problem originates in mercy's relationship with justice.³

¹ For an empirical examination of some of the factors potentially influencing the clemency decisions of state governors, see Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 VA. L. REV. 239 (2003).

² For a description of the Capital Jury Project, see *infra* notes 45–47 and accompanying text.

³ The relevant philosophical literature consists of KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); Nathan Brett, *Mercy and Criminal Justice: A Plea for Mercy*, 5 CAN. J.L. & JURISPRUDENCE 81 (1992); Andrew Brien, *Mercy and Desert*, 20 PHIL. PAPERS 193 (1991) [hereinafter Brien, *Mercy and Desert*]; Andrew Brien, *Mercy, Utilitarianism and Retributivism*, 24 PHILOSOPHIA 493 (1995); Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83 (1998) [hereinafter Brien, *Mercy Within Legal Justice*]; Claudia Card, *On Mercy*, 81 PHIL. REV. 182 (1972); Ross Harrison, *The Equality of Mercy*, in *JURISPRUDENCE: CAMBRIDGE ESSAYS* 107 (Hyman Gross & Ross Harrison eds., 1992); Sterling Harwood, *Is Mercy Unjust?*, in *CRIME AND PUNISHMENT: PHILOSOPHIC EXPLORATIONS* 464 (Michael J. Gorr & Sterling Harwood eds., 1995); H. Scott Hestevold, *Disjunctive Desert*, 20 AM. PHIL. Q. 357 (1983); H. Scott Hestevold, *Justice to Mercy*, 46 PHIL. & PHENOMENOLOGICAL RES. 281 (1985) [hereinafter Hestevold, *Justice to Mercy*]; Carla Johnson, *Seasoning Justice*, 99 ETHICS 553 (1989); Carol Ann Hage Johnson, *Entitled to Clemency: Mercy in the*

Justice in punishment requires giving an offender the punishment he deserves, no more and no less.⁴ But to bestow mercy on an offender means giving him *less* punishment than he deserves. A punishment less than that which is deserved is an undeserved and therefore unjust punishment, albeit an unjustly lenient one. In short, mercy conflicts with justice. But if justice is pre-eminent among the virtues, and if mercy necessarily conflicts with justice, then how can mercy be a virtue?⁵

Criminal Law, 10 LAW & PHIL. 109 (1991); Stephen Kershnar, *Mercy, Retributivism, and Harsh Punishment*, 14 INT'L J. APPLIED PHIL. 209 (2000); John Kleinig, *Mercy and Justice*, 44 PHIL. 341 (1969); Jeffrie G. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, 7 CRIM. JUST. ETHICS, Summer/Fall 1988, at 3; Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS & MERCY* 162 (1988) [hereinafter Murphy, *Mercy and Legal Justice*]; JEFFRIE G. MURPHY, *Repentance, Punishment, and Mercy*, in CHARACTER, LIBERTY, AND LAW: KANTIAN ESSAYS IN THEORY AND PRACTICE 59 (1998); Martha Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993); A.T. Nuyen, *Straining The Quality of Mercy*, 33 PHIL. PAPERS 61 (1994); Lyla H. O'Driscoll, *The Quality of Mercy*, 21 S.J. PHIL. 229 (1983); George Rainbolt, *Mercy: An Independent, Imperfect Virtue*, 27 AM. PHIL. Q. 169 (1990) [hereinafter Rainbolt, *An Imperfect Virtue*]; George Rainbolt, *Mercy: In Defense of Caprice*, 31 NOÛS 226 (1997) [hereinafter Rainbolt, *In Defense of Caprice*]; George Rainbolt, *Mercy, Justice, and the Death Penalty*, (May 19, 2003) (unpublished manuscript, on file with the author) [hereinafter Rainbolt, *Mercy and the Death Penalty*]; H.R.T. Roberts, *Mercy*, 46 PHIL. 352 (1971); Mary Sigler, *The Story of Justice: Retribution, Mercy, and the Role of Emotions in the Capital Sentencing Process*, 19 L. & PHIL. 339 (2000); N.E. Simmonds, *Judgment and Mercy*, 13 OXFORD J. LEGAL STUD. 52 (1993); Alwynne Smart, *Mercy*, 43 PHIL. 345 (1968); Daniel Statman, *Doing Without Mercy*, 32 S.J. PHIL. 331 (1994); Steven Sverdlik, *Justice and Mercy*, 16 J. SOC. PHIL., Fall 1985, at 36; John Tasioulas, *Mercy*, 103 PROC. ARISTOTELIAN SOC'Y 101 (2003); P. Twambley, *Mercy and Forgiveness*, 36 ANALYSIS 84 (1976); Nigel Walker, *The Quiddity of Mercy*, 70 PHIL. 27 (1995).

Much of the credit for the recent interest in mercy among lawyers and legal philosophers goes to the work of Jeffrie Murphy, which draws in turn on that of Smart, Card, and Twambley. For critical reviews of Murphy's analysis of mercy, see Andrew Brien, *Saving Grace*, 9 CRIM. JUST. ETHICS, Winter/Spring 1990, at 52; R.A. Duff, *Justice, Mercy, and Forgiveness*, 9 CRIM. JUST. ETHICS, Summer/Fall 1990, at 51 (review essay); Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448 (1990) (book review); Herbert Morris, *Murphy on Forgiveness*, 7 CRIM. JUST. ETHICS, Summer/Fall 1988, at 15.

⁴ We assume that justice is non-disjunctive: it requires a specific and identifiable punishment. Others have argued that, on the contrary, justice is disjunctive: it specifies a range of deserved punishments, with a high end and a low end. Any punishment less than the maximum justice allows can then be characterized as merciful. Moreover, any such punishment is not only merciful, it's also just, because it falls within the range of deserved punishments. Accordingly, the conflict between mercy and justice evaporates. Arguments of this sort can be found in, for example, Brett, *supra* note 3, at 94; Hestevold, *Justice to Mercy*, *supra* note 3, at 281. For criticism, see Brien, *Mercy and Desert*, *supra* note 3, at 197 ("[T]he concept of disjunctive desert is incoherent."); Rainbolt, *In Defense of Caprice*, *supra* note 3, at 229–30 ("It seems that one cannot deserve two or four years for a crime. This seems as odd as a student whose work in a class deserves either an A or a C.").

⁵ This way of framing the problem defines mercy in relation to positive retributive justice, according to which the state is obligated to impose on an offender the punishment he deserves, no more and no less. On this view, justice and mercy necessarily conflict. Justice means giving an offender the punishment he deserves, while mercy means giving him less than he deserves. We should note two other possibilities.

First, mercy might be defined in relation to negative retributive justice, according to which the state has the right, but not the obligation, to impose on an offender the punishment he deserves. On this view, mercy and justice do not conflict. Because the state has no obligation to give an offender the punishment

What's more, while justice is subject to equality—the principle that like cases should be treated alike—mercy isn't. If an offender deserves, as a matter of justice, to be sentenced to death, then equality requires any other offender, similarly situated in all relevant respects, likewise to be sentenced to death. Justice must honor equality. But mercy, so it's thought, is a gift, an act of grace, which the mercy-giver is free to extend or withhold as he or she sees fit. Mercy, unlike justice, escapes equality's demands. Because mercy is not so constrained by equality, the fact that a mercy-giver extends mercy to one offender doesn't mean he's morally required to extend mercy to similarly-situated offenders. Unlike justice, mercy is, or at least can be, arbitrary. It can thus produce inequality as well as injustice. So, once again, how can mercy proclaim itself a virtue?

The general problem can be formulated as follows: How can mercy be a virtue—something that's morally good—if it conflicts with justice and equality? So formulated, the problem has two possible answers: One, mercy is a virtue because in truth it does not conflict with justice or equality; or two, mercy is a virtue despite its conflict with justice and equality.

The first answer says the conflict between mercy and justice is really a false one.⁶ According to this reply, justice is best achieved through rules faithfully followed to the letter. But rules designed to produce a just result will, on occasion at least, necessarily produce an unjust one. Rules are more or less, but inevitably, over- and under-inclusive with respect to the principle standing behind them. A rule or collection of rules designed to reach a just sentence will sometimes produce an unjustly harsh one (when the rules are over-inclusive), and sometimes an unjustly

he deserves, it does not act unjustly when it elects to show mercy, i.e., when it waives its right to impose deserved punishment. See Murphy, *Mercy and Legal Justice*, *supra* note 3, at 176 (defending this view); Harwood, *supra* note 3, at 464–65 (also defending his view). An act of mercy therefore entails no injustice. However otherwise attractive, this approach would seem vulnerable to all the criticisms directed at the negative retributivism on which it depends. See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 91 (1997) (criticizing negative retributivism).

Second, mercy might be defined, not in relation to justice, but in relation to power. Thus, “an act of mercy is an action in a relationship of vulnerability and power in which a powerful person intentionally reduces or removes altogether a threat to or the present suffering of another.” Brien, *Mercy Within Legal Justice*, *supra* note 3, at 2; see also Rainbolt, *In Defense of Caprice*, *supra* note 3, at 228 (“No analysis which defines mercy in terms of the relief of *deserved* suffering can account for all cases of the virtue.”). On this view, too, mercy and justice need not conflict. If a person has the power to reduce another's suffering, his doing so is an act of mercy. But if justice required him to reduce the other's suffering, his act would also be a just one. Thus, a single act can be both just and merciful. But where, as here, the focus is on the role of mercy within the context of law, mercy would seem to be better understood in relation to justice, not power. After all, the same act can be both merciful and just only if an actor has the power to act unjustly. Surely, however, the law cannot confess to giving those who act in its name the power to act unjustly.

⁶ See, e.g., Smart, *supra* note 3, at 349 (concluding that “most cases” of what are often characterized as acts of mercy are really “nothing more than a way of ensuring that the just penalty is imposed and injustice avoided”).

lenient one (when the rules are under-inclusive). Such is the cost of following rules, which may or may not be worth its benefits.⁷

On this view, mercy is understood as a remedy for the over-inclusiveness of rule-based justice. Mercy is needed when the application of the rules leads to a sentence more severe than that which justice, independent of the operative rules, would require.⁸ In these cases, mercy corrects any injustice to which the rules, left to their own devices, would lead. Mercy therefore secures the just sentence. But this solution to mercy's dilemma resolves its conflicts with justice and equality at the price of reducing mercy to equity, which is nothing more than the name justice assumes when sensitive to all the relevant facts. It thus treats mercy as an adjunct of justice, when in fact mercy purports to be an autonomous virtue, separate from and independent of justice.⁹

The second answer says justice and mercy are, as is commonly believed, distinct and separate virtues. Both require a form of fact-specific, as opposed to rule-based, decision-making. They differ over the individual facts and circumstances to which they attend. For example, one might argue that justice attends to all the facts and circumstances of the crime and the culpability of the offender, but nothing more. Mercy, in contrast, attends to a different set of facts. It might, for example, attend to the character of the offender,¹⁰ or to the impact of the offender's punishment on innocent third parties,¹¹ or to any other fact the natural tendency of which is to summon our sympathy, pity, or compassion. Thus, one offender might in mercy's

⁷ See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 135–66 (1991) (explaining the costs and benefits of decision-making according to rules).

⁸ The under-inclusiveness of rule-based justice, which produces a sentence less than that which the offender deserves, is seldom discussed. It constitutes a form of mercy by default.

⁹ On one view of the historical record, Aristotle and the tradition of Greek thought he reflects did not consider mercy a virtue independent of justice. For the Greeks, mercy was indistinguishable from compassion, and compassion was the emotion one rightly experienced in the face of another's undeserved suffering. Compassion for deserved suffering, in contrast, was no virtue at all. A person could not be faulted if he lacked compassion for another's deserved suffering, at least not if the other's suffering was, as it should have been, determined in accordance with demands of justice as equity. On the contrary, showing compassion for deserved suffering would have been considered a form of weakness of the will, a sentimental lack of self-control.

Mercy as compassion in the face of deserved suffering was an innovation of the Judeo-Christian tradition, which conceived of God as being at once both just and merciful. The problem was that if, as the Greeks believed, mercy was simply compassion for undeserved suffering, then God could not be understood as merciful. For if, given our fallen natures, none of us suffers undeservedly, if we all deserve the suffering that befalls us, then God would never show mercy. God would be merciless. God can therefore be understood as merciful only if mercy encompasses compassion not only for undeserved suffering, but for deserved suffering as well. Thus, contrary to the Greeks, mercy must be understood as a virtue independent of justice. For a more detailed discussion of this point, see Statman, *supra* note 3, at 348.

¹⁰ See Card, *supra* note 3, at 184.

¹¹ See Smart, *supra* note 3, at 350–51. Many of the reasons commonly identified as reasons to show mercy are collected and analyzed in Walker, *supra* note 3, at 32–35.

name receive a lesser sentence than an otherwise similarly-situated offender if the first offender, but not the second, acted out of character, or if he, but not the second, is a single father whose otherwise just punishment would impose particular hardship on his dependents.

So far, so good. But if one insists that acting out of character or whatnot *entitles* an offender to mercy, then mercy begins to lose its gift-like character.¹² The fact that reasons can be given in support of mercy doesn't mean an offender to whom those reasons apply is entitled to mercy. Insofar as mercy is a gift, no one is entitled to it, not even strong candidates for it. At the same time, the fact that no one is entitled to mercy doesn't mean mercy, when given, should be understood as an act of supererogation. If mercy is supererogatory, then a person who *never* showed mercy would, despite his mercilessness, be immune to moral criticism. Supererogatory acts are acts above and beyond the call of duty, and moral criticism is fairly directed only at those who fall short of their duty, not at those who fail to go beyond it. Yet when we call someone "merciless," we *are* issuing a moral criticism. We do fairly criticize someone who never shows mercy; as such, mercy isn't merely supererogatory.

All in all, mercy is probably best understood as an imperfect obligation, in contrast to justice, which is a perfect obligation.¹³ As a perfect obligation, justice never lets down its guard. It insists its demands be satisfied whenever and wherever they arise. Thus, an actor who imposes different punishments on similarly-situated offenders acts unjustly in two ways. First, he acts unjustly in a substantive sense. Assuming one of the offenders has received the punishment he deserves, the other offender necessarily has not. Second, he also acts unjustly in the formal sense reflected in the principle of equality. He has not treated like cases alike.

Mercy, as an imperfect obligation, follows a different logic. An actor who shows an offender mercy can of course be criticized for having acted unjustly. He has necessarily given the offender less punishment than he deserves. Such is the nature of mercy. Likewise, if he elects to show mercy to one offender, but not to a similarly-situated offender, he can be criticized for having treated the two unequally. But equality simply does not constrain mercy. If it did, mercy would lose its character as a gift. On the other hand, treating mercy as an imperfect obligation means an actor who never showed mercy on any of the occasions warranting it would be open to moral criticism, as he would not be if mercy were truly supererogatory. As an imperfect obligation, mercy must be displayed on at least some of the occasions warranting it, but it need not be displayed on them all.¹⁴

¹² For an argument along the lines that mercy should be conceived of as being subject to the principle of equal treatment, see Walker, *supra* note 3, at 35–36.

¹³ The idea that mercy is an imperfect duty or obligation is discussed in Murphy, *Mercy and Legal Justice*, *supra* note 3, at 181–83, and developed at greater length in Kershnar, *supra* note 3, at 210–11, and especially in Rainbolt, *In Defense of Caprice*, *supra* note 3, at 11; and Rainbolt, *An Imperfect Virtue*, *supra* note 3. For an extended discussion of the distinction between perfect and imperfect obligations, see George Rainbolt, *Perfect and Imperfect Obligations*, 98 PHIL. STUD. 233, 250 (2000) [hereinafter Rainbolt, *Obligations*].

¹⁴ See Rainbolt, *In Defense of Caprice*, *supra* note 3, at 232 ("The difference between super-

On this view, the conflict between mercy and justice persists, as does the conflict between mercy and equality. Mercy is an autonomous virtue incapable of being squared with justice and equality. That's just the way it is. If justice can never take second place to mercy, or if equality must never be compromised, then mercy should be banished, not only from our practices of punishment, but from the catalogue of moral virtues. Mercy should be exposed for the vice it is. If, on the other hand, justice and equality should sometimes yield to mercy, then mercy should continue to be counted among the virtues. Mercy is not without cost in the currency of justice and equality, but the costs might be worth the benefits.¹⁵

Any such embrace of mercy raises another question. In whom should the power of mercy be vested? Some maintain mercy is a virtue only when exercised by private actors, not by state actors. The idea is that state actors, unlike private actors, are bound to uphold the rule of law, but mercy, because it is inherently capricious, is incompatible with the rule of law. On this view, the power of mercy can legitimately be vested, if at all, only in the hands of individual victims or, if the victim is deceased, in the hands of those with whom he or she is most closely identified.¹⁶ The state can only grant mercy, if at all, as the victim's agent.¹⁷

But if crime is seen not only as an offense against the individual victim, but against us all, then perhaps mercy should be available not only to private actors, or to state actors acting in the victim's name, but to state actors acting in our collective name.¹⁸ Moreover, although mercy can conflict with the rule of law because it can be capricious, caprice should not be confused with discrimination. Mercy-givers can fairly be expected to give reasons for giving mercy: the offender has shown remorse, he saved the life of a drowning child in the course of committing the offense, and so forth.¹⁹ Granting or withholding mercy because of the offender's race or sex or on some other equally invidious ground is not a reason mercy should countenance.

erogation and imperfection is that if one never does any supererogatory acts, one has done nothing wrong, but if one never does any imperfectly obligatory acts, one has done something wrong."'). Rainbolt offers a slightly different analysis of imperfect obligation in Rainbolt, *Obligations*, *supra* note 13, at 239–43.

¹⁵ For thoughts on the nature of those benefits and why mercy is properly considered a virtue, see Brien, *Mercy Within Legal Justice*, *supra* note 3, at 106; Kershnar, *supra* note 3, at 211–15; Nussbaum, *supra* note 3, at 101; Rainbolt, *In Defense of Caprice*, *supra* note 3, at 238; Rainbolt, *Mercy and the Death Penalty*, *supra* note 3, at 14–19.

¹⁶ See Murphy, *Mercy and Legal Justice*, *supra* note 3, at 167–68. Other expressions of this view can be found in MOORE, *supra* note 3, at 192; Harrison, *supra* note 3, at 118; Stephen J. Morse, *Justice, Mercy and Crazyiness*, 36 STAN. L. REV. 1485, 1509 (1984) (book review).

¹⁷ See Murphy, *Mercy and Legal Justice*, *supra* note 3, at 178.

¹⁸ See Duff, *supra* note 3, at 59 ("If . . . [mercy] can be appropriate for us as individual citizens, should we not make room for it in the criminal law by empowering judges, or some other official, to show mercy to criminals?").

¹⁹ See Walker, *supra* note 3, at 34.

Mercy is capricious, not because mercy-givers lack reasons, but because they may choose not to act on those reasons for non-discriminatory reasons of their own.²⁰

The question comes down to this. Which is morally better: a state that adheres without fail to justice and equality, or one that allows those virtues to be compromised from time to time for mercy's sake?²¹ Perhaps the answer depends on who the state actor is. Maybe judicial actors should focus only on doing justice, while executive actors could rightly be authorized to temper justice from time to time with mercy.²² In any event, whatever answer one gives to such normative questions, state governors and the President have in fact long had the authority to grant clemency, and insofar as that authority vests in them the power to grant mercy, they have long had the power to be merciful, too.²³ But what about capital jurors? Do they too have the legal authority to dispense mercy? Must they have it? These questions take us from philosophy to law, and in particular, to the constitutional law of mercy.

II. THE CONSTITUTION OF MERCY

A capital defendant's sentence, life or death, is decided in the so-called penalty phase of the trial, after the jury has found the defendant guilty. It is also where one might reasonably expect the conflict between mercy and justice to find legal expression, if not resolution, in constitutional doctrine. So, does the law side with mercy or with justice? Must capital jurors have the freedom to be merciful, at the expense of justice, or can they be denied that freedom, in the name of justice?

²⁰ Insofar as mercy requires state actors to be vested with discretion, it does of course create a risk that such discretion will be exercised discriminatorily. But that risk exists whenever a state actor requires discretion to do his or her job, including the discretion needed to do justice in the individual case. Equal protection norms forbid invidious discrimination with respect to the discretionary charging decisions of prosecutors, *see, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996), even if those norms are, according to some, unduly weak. Moreover, although the Supreme Court has held that the discretionary clemency decisions of state governors are subject to minimal procedural due process demands, *see Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (plurality opinion); *id.* at 290 (opinion of Stevens, J.), it has not yet held that those decisions are subject to the requirements of equal protection. Still, the inadequacy or non-existence of mechanisms by which to ferret out discrimination in the exercise of discretion argues in the first instance for imposing or strengthening such mechanisms, not for eliminating discretion if and when needed.

²¹ Dressler gives this answer: "I think it is safe to say that most of us . . . want a penal system that allows for both justice and mercy. And, since we cannot fully have both, we treat justice as the primary goal, but one which we are prepared to compromise in unusual circumstances out of compassion for the person who must suffer our justice." Dressler, *supra* note 3, at 1472. *But see* Dan Markel, *Against Mercy*, 102 MINN. L. REV. 1421, 1480 (2004) ("[M]ercy is a source of especial shame for a nation secure in its institutions and confident in its desire to share the blessings of equal liberty under law.").

²² *See* Murphy, *Mercy and Legal Justice*, *supra* note 3, at 174 (suggesting this division of labor as a possible approach).

²³ For a brief but helpful history of the clemency power in the United States, *see* Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 589–611 (1991). *See also* James R. Acker & Charles S. Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200 (2000).

Answering these questions isn't easy. At the outset, one must keep in mind that the Supreme Court has refused to say the penalty phrase must conform to any single, substantive theory of punishment. Instead, the Court has required the penalty phase to conform to a pair of formal principles, both of which are ostensibly derived from the Eighth Amendment's prohibition on the imposition of cruel and unusual punishments. Both principles are formal insofar as they neither openly embrace any substantive theory of punishment, such as retributivism, nor reject any such theory, so long as it has at least some rational basis.²⁴ The two constitutional principles regulating the law of capital sentencing are thus both agnostic and ecumenical with respect to what, if anything, substantively justifies condemning an offender to death for his crime.²⁵

The first principle, known as the principle of consistency, is in effect a demand for equal treatment. It requires like cases be treated alike and insists the punishment imposed on one defendant be consistent with, or the same as, that imposed on any and all similarly-situated defendants.²⁶ By itself, however, this principle takes no stand on what facts should be understood as making one defendant similar to, or different from, the next. That would require commitment to a substantive theory. The second principle, known as the principle of individualization, requires the punishment imposed on a capital defendant be based on all the relevant facts about the crime and the offender. Again, by itself, this principle takes no stand on which facts should be relevant and which should not be.²⁷ That too would require commitment to a substantive theory.

In an ideal world these two principles are completely compatible. If capital jurors were perfect, they would treat each defendant as an individual (thus satisfying the individualization principle) and in so doing would sentence to death all those and only those who should be so sentenced (thus satisfying the consistency principle).²⁸

²⁴ See, e.g., Louis D. Bilonis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 301 (1991).

²⁵ With respect to the substance or content of mitigating factors, the Court has held that a state cannot preclude the jury from considering "any aspect of a defendant's character or record and any of the circumstances of the offense . . . proffer[ed] as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis added). With respect to the substance or content of aggravating factors, the Court has held that a state is free to denominate any fact or circumstance an aggravating circumstance so long as the language in which that factor is formulated is not unduly vague and can "reasonably justify the imposition of a more severe sentence on the defendant compared to other found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Thus, the Court requires jurors to have access to any fact that might provide a rational basis for a sentence less than death, and leaves states more or less free to present jurors with any fact that might provide a rational basis for a sentence greater than life imprisonment.

²⁶ See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

²⁷ See *Lockett*, 438 U.S. at 604–05; *Parker v. Dugger*, 498 U.S. 308, 315 (1991); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Bell v. Ohio*, 438 U.S. 637, 642 (1978).

²⁸ See, e.g., Margaret Radin, *Proportionality, Subjectivism, and Tragedy*, 18 U.C. DAVIS L. REV. 1165, 1168 (1985).

But capital jurors are not perfect. They make mistakes. As a result, the principles of consistency and individualization, though compatible in theory, conflict in practice. Requiring jurors to treat capital defendants as individuals means giving them more discretion, which entails less consistency across cases. Conversely, requiring consistency across cases means giving jurors less discretion, which entails less individualized treatment for each defendant. The conflict between individualization and consistency is, in practice if not in theory, a zero-sum game.²⁹

Emphasizing one principle at the other's expense would produce corresponding and substantial changes in the legal design of the penalty phase. Emphasizing the principle of consistency would mean placing limits on a jury's discretion. The facts and circumstances a jury could entertain would be limited to those specifically enumerated in statute; those factors would be well-defined and easy to apply; the weight of each factor would be specified; and the jury would have no option but to impose death if the weight of the factors favoring death was greater than the weight of those favoring life. At the extreme, the principle of consistency would eliminate the jury's discretion altogether. Death would be automatically imposed by operation of law. The jury would be unnecessary. The law alone would decide the defendant's fate.

In contrast, emphasizing the principle of individualization would mean removing obstacles to the exercise of the jury's discretion. So, for example, the jury would be entitled to hear any and all facts the state or the defendant wanted to introduce. It would then have the discretion to decide for itself which among this mass of facts were relevant and which not. It would also have the discretion to assign those facts whatever weight its members deemed appropriate, as well as the discretion to return a sentence of life imprisonment, even when in its view the balance of aggravation and mitigation favored death. At the extreme, the principle of individualization would eliminate the law's guidance altogether. The law would be unnecessary. The jury alone would decide the defendant's fate.

Much of the Court's work in capital cases over the past thirty years, beginning with *Furman v. Georgia*,³⁰ has been an effort to strike a balance between the demands of these two principles. Some justices no longer believe the effort worth making. Justice Scalia, for example, has concluded that the penalty phase need only comply with the consistency principle. Individualization, he has said, should be abandoned.³¹ In contrast, Justice Blackmun, shortly before his retirement from the Court, concluded that the penalty phase must conform to both principles, and because it couldn't, the

²⁹ See, e.g., Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 29-31 (1980); Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1148-55 (1980); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 325-26. The Court itself has acknowledged the conflict. See, e.g., *Tuilaepa v. California*, 512 U.S. 967, 973 (1994).

³⁰ 408 U.S. 238 (1972) (per curiam). *Furman* marks the beginning of the Court's modern-day efforts to subject the administration of the death penalty to constitutional regulation.

³¹ See *Walton v. Arizona*, 497 U.S. 639, 664-65 (1990) (Scalia, J., concurring).

death penalty itself, not one of the two principles, should be abandoned.³² The Court's majority, however, continues to take one case at a time, trying to accommodate each principle while continuing to express allegiance to both.

This conflict between the formal principles of individualization and consistency, not the conflict between the substantive virtues of justice and mercy, has supplied the terms of the on-going constitutional debate.³³ As a result, it would be unreasonable to expect the penalty phase to reflect a coherent theory of mercy, and indeed, it does not.³⁴ Seen in one way, capital jurors must be free to exercise mercy. Seen in another, they can be denied that freedom.

Here's the first way to look at it.³⁵ A defendant can be sentenced to death only if he is guilty of murder and only if he or his crime satisfy the elements of at least one valid statutory aggravating circumstance, as defined by state law.³⁶ The killing of a child or a police officer, or the commission of an especially "heinous, atrocious, or cruel" killing are just some among the many circumstances the states can and have elected to denominate as aggravating.³⁷ A defendant guilty of such an aggravated murder is characterized as "death-eligible."³⁸ As such, the jury can sentence him to death, but the law cannot require it to do so.

Now, if being death-eligible is, at least in the eyes of the law, tantamount to being death-deserving, then it follows that any death-eligible defendant who escapes death has necessarily been the beneficiary of mercy. Seen in this way, every death-

³² See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari).

³³ Some commentators suggest that the Court's insistence on consistency amounts to an insistence on justice to the exclusion of mercy, while its insistence on individualization amounts to an insistence on mercy at the expense of justice. See Rainbolt, *Mercy and the Death Penalty*, *supra* note 3, at 8. This understanding of the Court's death penalty doctrine assumes that the conflict between the consistency principle and the individualization principle simply replicates the conflict between justice and mercy. This is one way to read the cases, but not, we think, the best way.

³⁴ See *id.* at 26 n.24 (noting that "there is not one clear conceptual analysis [of mercy or justice] in [the Court's death penalty] opinions"). For an effort to describe how the penalty phase might be reconfigured in order to incorporate mercy into its general structure, see Stephen P. Garvey, "As the Gentle Rain from Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989 (1996). For a variety of proposals to "reviv[e] mercy through the actions of courts, legislatures, and governors," see Paul Whitlock Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389 (1989).

³⁵ The discussion that follows makes the simplifying—and counterfactual—assumption that all the facts allowed into the penalty phase are relevant only to determining the punishment the defendant deserves. That assumption is counterfactual because, among other things, facts relevant to the defendant's future dangerousness, which have no relevance to the sentence the defendant deserves, are nonetheless often allowed into the penalty phase for the jury's consideration. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880 (1983).

³⁶ See *Zant v. Stephens*, 462 U.S. 862 (1983).

³⁷ See generally James R. Acker & C.S. Lanier, "Parsing This Lexicon of Death": *Aggravating Factors in Capital Sentencing Statutes*, 30 CRIM. L. BULL. 107 (1994) (collecting and analyzing aggravating factors recognized in various jurisdictions).

³⁸ See *Tuilaepa v. California*, 512 U.S. 967, 981–82 (1994).

eligible defendant deserves death, but capital jurors cannot be forced to sentence a defendant to death just because he is death-eligible. Capital jurors are therefore always free to extend mercy to such a defendant, and no state can deny them that freedom.

Here, though, is another way to look at it. Perhaps death-eligible status does not mean the defendant deserves death. Insisting that no capital defendant can be sentenced to death unless he is found to be death-eligible might just be a way to achieve a very modest measure of consistency in capital sentencing. Before a capital defendant can be condemned to death he must at least pass the threshold of eligibility. He, along with every other defendant sentenced to death, must at least be guilty of aggravated murder. On this view, therefore, death-eligible does not mean death-deserving.

Instead, perhaps a defendant should be said to deserve death only when the jury, after having considered and weighed all the admissible evidence in aggravation and mitigation, decides that aggravating factors outweigh mitigating ones. Now, while a state cannot force a jury to impose death on a defendant just because he is death-eligible, it can force a jury to impose death if the jury itself finds at least one aggravating circumstance applies but no mitigating circumstance does,³⁹ or if it decides that any applicable aggravating circumstances outweigh any applicable mitigating ones.⁴⁰ Seen in this way, a state can require a jury to impose death if it decides that death is, all things considered, deserved. In other words, a state is free to eliminate mercy as an option. The jury must do justice as it sees it.

Finally, consider the case of the *Brown v. California*,⁴¹ in which the Court permitted a state to caution jurors against the influence of sympathy. The specific instruction at issue in *Brown*, known as an anti-sympathy instruction, told jurors to ignore "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, and public feeling." While no one would object to telling jurors to guard against the influence of prejudice, sympathy is not in the same league as prejudice. On the contrary, sympathy, pity, and compassion provide the emotional basis and motivation for mercy.⁴² Sympathy, pity and compassion transform an act of mercy into a merciful act. Consequently, even if states must, so to speak, give jurors the freedom to commit acts of mercy, *Brown* gives them the freedom to caution jurors against committing such acts *out of* mercy.⁴³

³⁹ See *Blystone v. Pennsylvania*, 494 U.S. 299, 302-03 (1990) (upholding requirement of Pennsylvania capital sentencing statute providing that "[t]he verdict *must* be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances") (emphasis added).

⁴⁰ See *Boyde v. California*, 494 U.S. 370, 374-76 (1990) (upholding California standard jury instruction providing that "[i]f you [the jury] conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death").

⁴¹ 479 U.S. 538 (1987).

⁴² See, e.g., Rainbolt, *In Defense of Caprice*, *supra* note 3, at 233.

⁴³ The majority opinion in *Brown* emphasized two features of the particular instruction under

In the end, mercy's status in the law of capital sentencing remains ambiguous. Whether or not jurors must be free to extend mercy depends on what, in the law's eyes, makes a defendant deserving of death. But so long as the Court avoids substantive theory, that question will remain unanswered. For now, however, we leave behind the constitutional law of mercy and turn instead to its empirics. Are some capital jurors more merciful than others? If so, do they in fact behave more mercifully?

III. THE EMPIRICS OF MERCY

The following analysis offers a portrait of the merciful juror. After briefly describing the data, we use the responses jurors gave to a series of questions about mercy to construct a scale enabling us to rank jurors as being more or less merciful. We next examine how more merciful jurors differ, if at all, from the less merciful along a variety of dimensions. We then try to identify which, if any, demographic variables are associated with a capital juror's being more or less merciful. Finally, we explore whether more merciful jurors are in fact more likely than their less merciful counterparts, all else being equal, to vote for life instead of death.⁴⁴

A. *The Capital Jury Project*

The data analyzed here were gathered in conjunction with the Capital Jury Project (CJP), a National Science Foundation-funded research effort designed to investigate juror decision-making in capital cases.⁴⁵ Researchers from various disciplines, primarily law and criminology, and from a number of schools and universities were enlisted to conduct in-depth interviews with jurors who had served on a death penalty case. The 50-plus-page survey took several hours to administer, canvassed a wide range of topics, and gathered information on over 700 variables.⁴⁶

review. First, the instruction referred to "mere sympathy," which the Court construed as sympathy "not rooted in the aggravating and mitigating evidence introduced during the penalty phase." *See Brown*, 479 U.S. at 542. While this emphasis implies that an instruction omitting the word "mere," and thereby proscribing sympathy rooted in the evidence, would be unconstitutional, the Court in a later case expressed doubts about any such implication: "Because we concluded in *Brown* that it was permissible under the Constitution to prevent the jury from considering emotions not based upon the evidence, it [does not necessarily] follow[] that the Constitution requires that the jury be allowed to consider and give effect to emotions that are based upon mitigating evidence." *Saffle v. Parks*, 494 U.S. 484, 494 (1990).

Second, the *Brown* Court emphasized that sympathy was only one word in a list of otherwise clearly impermissible influences on a juror's decision. *See Brown*, 479 U.S. at 542-43. Thus, an anti-sympathy instruction focusing on sympathy alone, and not merely as one member of a group of clearly impermissible influences, might not survive constitutional review.

⁴⁴ Analysis of the data was conducted using Stata statistical software (version 7.0).

⁴⁵ *See William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

⁴⁶ For a discussion of the limitations of the interview methodology, see, for example, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538

A number of studies based on CJP data have been published over the past ten years.⁴⁷ The data analyzed here were gathered from the South Carolina segment of the CJP. Interviews with South Carolina jurors began in 1991 and continued through the summer of 2002. The existing database consists of 214 jurors who sat on one of 65 cases, by far the largest number of interviews conducted in any individual state among those states participating in the CJP. Forty-seven percent of the jurors sat on a case in which the jury voted for death; 53% on a case in which the jury voted for life. Eighty-four percent of the jurors were white; 16% were black. Forty-six percent were male; 54% were female. Fifty-six percent of the defendants were black; 44% were white.

South Carolina's capital sentencing scheme is similar to that of many states. Capital trials are bifurcated. During the first phase, known as the guilt phase, the jury determines whether or not the defendant is guilty of murder.⁴⁸ Once convicted of

(1998).

⁴⁷ Quantitative analyses of CJP data appear in Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011 (2001); John H. Blume, Theodore Eisenberg & Stephen P. Garvey, *Lessons from the Capital Jury Project*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 144 (Stephen P. Garvey ed., 2003); Bowers, *supra* note 45; William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51 (2003); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998); William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306 (2003); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277 (2001) [hereinafter Eisenberg et al., *Forecasting*]; Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) [hereinafter Eisenberg et al., *But Was He Sorry?*]; Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371 (2001); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993); Garvey, *supra* note 46; Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000); Stephen P. Garvey & Paul Marcus, *Virginia's Capital Jurors*, 44 WM. & MARY L. REV. 2063 (2003); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995); Marla Sandys, *Cross-Over—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183 (1995); Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997).

Qualitative analyses of CJP data can be found in Joseph L. Hoffmann, *Where's The Buck—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103 (1995).

⁴⁸ "Murder" in South Carolina is defined as the "killing of any person with malice aforethought,

murder, the defendant enters the second phase, known as the penalty phase, during which the jury will decide his sentence. A defendant who enters the penalty phase becomes eligible for death once the state proves the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.⁴⁹ Thereafter, the jury is free to consider all relevant evidence in reaching its final decision between life imprisonment and death.⁵⁰ South Carolina law makes no additional effort to guide the jury's decision. The jury is not, for example, told to "weigh" aggravating circumstances against mitigating ones. Instead, the jury is usually instructed on the meaning of the applicable aggravating and mitigating circumstances and then told it may impose a life sentence "for any reason or no reason at all."⁵¹

On one interpretation, the structure of South Carolina's sentencing scheme always leaves jurors free to grant mercy. If a defendant is said to deserve death if and when a jury determines he is death-eligible, then jurors in South Carolina, as in all other states, are free to grant mercy. South Carolina law does not, and constitutionally cannot, force jurors to impose death on a defendant simply because he is death-eligible. Moreover, although South Carolina could force jurors to impose death if they decided, based on all the relevant facts and circumstances, that the defendant deserved death, in the sense that aggravating circumstances outweighed mitigating circumstances, it does not do so. Jurors in South Carolina, unlike jurors in some other states, always remains free to impose a life sentence, no matter what the balance of aggravating and mitigating circumstances. Seen in this way, the structure of South Carolina law leaves open the possibility of mercy.

On the other hand, the South Carolina Supreme Court has on several occasions, both before and after the U.S. Supreme Court's decision in *Brown*, upheld the discretion of trial courts to give jurors an anti-sympathy instruction,⁵² and trial courts routinely give such an instruction.⁵³ For example, in *State v. Bell*,⁵⁴ the Court upheld an instruction telling jurors: "As jurors, you must decide the issues involved in this proceeding without bias and without prejudice to any party. You cannot allow yourselves to be governed by sympathy, by prejudice, by passion, or by public

either express or implied." See S.C. CODE ANN. § 16-3-10 (Law. Co-op. Supp. 2002).

⁴⁹ See *id.* §16-3-20(C).

⁵⁰ The jury's sentencing decision is formally denominated as a "recommendation" to the trial judge, but the trial judge "shall sentence the defendant to death" when the jury so recommends. See *id.* A jury recommendation in favor of death must be unanimous. Failure to reach unanimity results in a sentence of life imprisonment. See *id.*

⁵¹ See Garvey, *supra* note 46, at 1549 n.47.

⁵² See *State v. Bell*, 393 S.E.2d 364, 374-75 (S.C. 1990); *State v. Owens*, 359 S.E.2d 275, 279 (S.C. 1987); *State v. Plemmons*, 332 S.E.2d 765, 769 (S.C. 1985); *State v. Chaffee*, 328 S.E.2d 464, 470 (S.C. 1984) (per curiam).

⁵³ E-mail from John Blume, former Executive Director, South Carolina Death Penalty Resource Center, to Stephen P. Garvey, Professor of Law, Cornell Law School (July 11, 2003, 02:56:02 EST) (on file with author).

⁵⁴ 393 S.E.2d 364 (S.C. 1990).

opinion.”⁵⁵ Once again, prejudice, passion, and public opinion are one thing. Sympathy is another. Insofar as sympathy is what motivates mercy, South Carolina jurors are routinely instructed to ignore it. In the end, therefore, South Carolina law sends a mixed message on mercy. Its general structure allows jurors to grant mercy, but a common instruction tells them not to be merciful.

B. *The Mercy Scale*

The CJP survey asked several questions designed to explore a juror’s beliefs about the role of mercy in his or her sentencing decision. Jurors were presented with a series of statements about mercy and asked to rate how true they thought the statement was. Available responses ranged from “very true,” “fairly true,” “not very true,” to “not true.” The questions and results appear in Table 1.⁵⁶

Table 1.
How true are the following statements about the role of mercy in your
decision about the defendant’s punishment?

	very true	fairly true	not very true	not true	n
Panel A					
The idea of mercy never occurred to you	22%	26%	19%	33%	211
Defendant didn’t deserve mercy because he didn’t show any toward his victim	38%	30%	13%	20%	208
If defendant wanted mercy, he should have admitted his guilt from the very beginning	40%	21%	13%	27%	200
Panel B					
Defendant deserved mercy because he was sorry	5%	7%	10%	78%	207
Defendant deserved mercy due to mental problems	5%	12%	10%	73%	208
Defendant deserved mercy because other people wanted to see him have another chance	4%	12%	17%	67%	210
Defendant deserved mercy because you felt he would try to make up for what he did	4%	6%	11%	78%	210

⁵⁵ *Id.* at 374.

⁵⁶ The survey also asked jurors to respond to a statement not reported in Table 1, namely: that the “law required jurors to decide about punishment without thinking about mercy.” Nineteen percent of the jurors responded “very true” to this statement, 16% “fairly true,” 20% “not very true,” and 45% “not true.” This statement is not reported in Table 1 because, unlike the Panel B statements, it does not capture a juror’s assessments of the facts of the case, nor, unlike the Panel A statements, does it capture a juror’s disposition toward mercy. It instead captures a juror’s understanding of what the law required of him or her.

We would note that 65% of the jurors thought it was to some extent false to say that the law required them to decide without thinking about mercy, while 35% thought it was to some extent true. This disagreement reinforces the possibility that South Carolina law sends jurors mixed messages on mercy. See *supra* notes 49–55 and accompanying text.

The statements are divided into two panels, A and B. The distribution of responses to the statements in Panel A is noticeably different from that in Panel B. Responses to the Panel A statements are distributed across all four possibilities. For example, when presented with the statement “mercy never occurred to you,” 22% of the jurors said “very true,” while 33% said “not true.” In contrast, most jurors responded “not true” or “not very true” when presented with the statements in Panel B.⁵⁷ For example, when presented with the statement that the “defendant deserved mercy because he was sorry,” 78% of the jurors responded “not true,” while only 5% responded “very true.”

These different patterns suggest that the responses to the two groups of statements are capturing different phenomena. The Panel B statements appear to be capturing a juror’s assessment of the facts of the case. For example, a juror is less likely to agree that a defendant deserves mercy “because he was sorry” if in fact the juror believes the defendant in the case on which he or she served was not sorry. Likewise, a juror is less likely to agree that a defendant deserves mercy “due to mental problems” if in fact the juror believes the defendant in the case on which he or she served suffered from no such problems. The same goes for the remaining two statements in Panel B.

In contrast, the Panel A statements appear to be capturing a juror’s general beliefs about mercy and perhaps his or her disposition to be merciful. For example, a juror to whom the idea of mercy never even occurred can be characterized as less merciful than one to whom it did. Likewise, insofar as few, if any, defendants charged with capital crimes can be said to have shown mercy to their victims, a juror who responded “not true” to the statement “defendant didn’t deserve mercy because he didn’t show any to his victim,” can be characterized as more merciful than one who responded “very true.” Overall, therefore, the responses to the Panel A statements arguably capture a juror’s disposition to be merciful or not, whereas the responses to the Panel B statements tend to capture a juror’s assessment of the facts of the particular case on which he or she served.

Rather than rely on any single question from Panel A to represent a juror’s disposition toward mercy, we combined responses to all three questions in order to develop a more nuanced and complex measure. Responses to each Panel A question were coded on a scale ranging from one to four, with one corresponding to the least merciful response and four corresponding to the most merciful. These responses were added together in order to create a new variable with values ranging from three to twelve (recoded on a scale ranging from one to ten). The jurors were then sorted into three groups based on their respective mercy scores, labeled “low,” “middle,” and “high.” The resulting distribution is shown in Table 2.

⁵⁷ These questions misunderstand the nature of mercy insofar as they imply that a defendant is *entitled* to mercy because he is, for example, sorry for his crime. As discussed in Part I, the fact that an offender is sorry may provide a reason to grant him mercy, but it provides him with no entitlement to mercy.

Table 2.
Mercy Scores

Mercy Score	Percent	n
Low	29%	57
Middle	52%	103
High	19%	38
Total	100%	198

Note—Fifteen observations are recorded as missing.

The majority of jurors (52%) are neither particularly merciful nor particularly merciless in comparison to the others. Nearly a third can be classified as merciless in comparison to the rest, while 19% can be classified as merciful. Using this measure of a juror's disposition toward mercy, we should expect jurors with high mercy scores to think and act in ways that distinguish them from those with low mercy scores.

Before turning to that question, we hasten to emphasize that if our mercy scale is indeed capturing a distinctive disposition among our jurors, that disposition might not be properly characterized as the disposition, strictly speaking, to be merciful. The questions on which our mercy scale is based do indeed speak in terms of "mercy," but the questions leave that term undefined. Each juror responded to the questions in light of his or her own beliefs about the meaning of mercy. So, while we will continue to characterize our jurors as more or less "merciful," that characterization has no greater precision than the questions we asked will allow.

C. *Does the Merciful Juror Think and Feel Differently?*

High-mercy jurors might think, feel, and behave in ways that set them apart from the others. In order to see if they do, we compared how jurors in each of the three mercy groups responded to three different sets of statements or considerations. The results are presented in the tables that follow. The first set involved statements relating to the punishment of convicted murderers (Table 3). The second involved statements relating to the thoughts and feelings the juror might have had toward the defendant (Table 4), and the third involved various considerations the juror might have believed important when deciding what punishment to impose (Table 5).

1. Thinking About Punishment

Merciful jurors should hold beliefs consistent with their merciful disposition. One should not expect high-mercy jurors to be overly merciful, however. Keep in mind that all capital jurors, including the jurors interviewed here, are "death-qualified."⁵⁸ A prospective capital juror who refuses to impose a death sentence if the law allows it, and if the facts warrant it, can be excused for cause. All capital jurors

⁵⁸ See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); see also *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968).

are thus “qualified” to impose a death sentence. Moreover, as a result of this process, arguably the most merciful among us—those who would never impose a death sentence—will simply never find their way onto a capital jury in the first place.

The CJP survey asked jurors to agree or disagree with a series of statements about the punishment of convicted murderers. Their responses were coded on a scale ranging from one to three,⁵⁹ with a response of one indicating strong or moderate disagreement, a response of two indicating slight disagreement or slight agreement, and a response of three indicating either moderate or strong agreement. Table 3 reports the mean response to each statement for each of the three groups of jurors. For example, jurors with a low mercy score gave a mean response of 2.80 to the statement “you wish we had a better way than the death penalty of stopping murderers.” As a group, low-mercy jurors tended therefore to agree with the statement. High-mercy jurors, with a mean response of 2.67, also tended on average to agree with the statement, but less so than did the low-mercy jurors.

This result may seem counterintuitive. However, as the figure in the p-value column indicates, this result is statistically insignificant. The p-value is a figure indicating the statistical significance of the differences between the mean responses of the three groups of jurors. According to conventional criteria, a p-value greater than 0.050 should seriously diminish one’s confidence in the hypothesis that the observed differences between the three groups reflects anything more than chance. So, for example, the p-value with respect to the juror responses to the stopping-murderers statement is statistically insignificant at $p = 0.257$. In other words, the observed differences between the three groups of jurors might be nothing more than the product of chance variation. Accordingly, we should hesitate to claim the observed differences are actual differences.

⁵⁹ The scale was originally coded one to six.

Table 3.
Do you agree or disagree with the following statements about punishment for
convicted murderers?
(means displayed on 1 [strongly or moderately disagree]
to 3 [strongly or moderately agree] scale)

	Mercy Score			n	p-value
	Low	Middle	High		
You wish we had a better way than the death penalty of stopping murderers	2.80	2.69	2.67	190	0.257
The death penalty is too arbitrary because some people are executed while others serve prison terms for the same crimes	2.93	2.67	2.77	188	0.035
If the death penalty were enforced more often there would be fewer murders in this country	2.80	2.51	2.34	180	0.002
Even convicted murderers should not be denied hope of parole some day, if they make a real effort to pay for their crimes	2.20	2.01	2.03	182	0.236
Murderers owe something more than life in prison to society and especially to their victims' families	2.89	2.69	2.41	185	0.009
Defendants who can afford good lawyers almost never get a death sentence	2.46	2.56	2.44	182	0.580
The death penalty should be required when someone is convicted of a serious intentional murder	2.81	2.48	2.22	182	0.001
You have moral doubts about death as punishment	2.13	2.04	2.13	194	0.936
Persons sentenced to prison for murder in this state are back on the streets far too soon	2.60	2.62	2.71	168	0.852

Note—Significance levels are based on Kendall's tau.

The three groups of jurors differed significantly in their responses to four of the statements. High-mercy jurors are less likely than low-mercy jurors to agree that greater enforcement of the death penalty would lead to fewer murders, that murderers owe something more than life imprisonment to society and the victims' family, and that the death penalty should be required when a defendant is convicted of a serious intentional murder. Each of these differences is arguably consistent with the beliefs one would expect of more merciful jurors in comparison to less merciful ones. On the other hand, high-mercy jurors are also less likely than low-mercy jurors to agree, although only slightly so, that the death penalty is too arbitrary because some people are executed while others serve prison terms for the same offenses.

Overall, the results suggest the following pattern. High-mercy jurors, like low-mercy jurors, do not seem to question the basic legitimacy of the death penalty. Their doubts about the death penalty are not greater, nor do they see its administration as more arbitrary. Nor do they differ from low-mercy jurors in their general belief that those convicted of murder should probably spend a very long time, if not the rest of their lives, in prison. But the high-mercy juror is less likely to believe death should be required, or that a murderer owes something more than life in prison. The high-mercy juror is likewise more skeptical that the death penalty will really reduce the murder rate. All in all, the merciful juror appears prepared to say death can be an appropriate

response to the defendant's crime, but less prepared to say it is the only appropriate response.

2. Thinking About the Defendant

The CJP survey also asked jurors about their thoughts and feelings toward the defendant. Jurors were once again presented with a series of statements—e.g., found the defendant frightening, felt pity or sympathy for the defendant—and asked, yes or no, if they had experienced any of the thoughts or feelings expressed in those statements. The mean responses for each of the three mercy groups, presented in Table 4, reflect the percentage of jurors in each group who said they experienced the corresponding thought or feeling.

Table 4.
Did you have any of the following thoughts or feelings about the
defendant?
(means displayed on 0 [no] to 1 [yes] scale)

	Mercy Score			n	p-value
	Low	Middle	High		
Found defendant frightening to be near	0.263	0.206	0.132	197	0.126
Felt anger or rage toward the defendant	0.333	0.320	0.184	198	0.165
Felt pity or sympathy for the defendant	0.421	0.495	0.632	198	0.052
Found defendant likable as a person	0.214	0.377	0.132	184	0.678
Was disgusted or repulsed by the defendant	0.421	0.379	0.132	198	0.008
Couldn't stand to look at the defendant	0.088	0.068	0.053	198	0.503
Imagined being like the defendant	0.088	0.136	0.105	198	0.669
Imagined yourself in the defendant's situation	0.211	0.223	0.289	198	0.415

Note—Significance levels are based on Wilcoxon rank-sum.

Responses to two of the statements are statistically significant or nearly so. First, merciful jurors are noticeably less likely to say they were disgusted or repulsed by the defendant. Among the low-mercy jurors, 42% said they found the defendant disgusting or repulsive, in comparison to only 13% of the high-mercy jurors. Second, while 42% of the low-mercy jurors said they felt pity or sympathy for the defendant, 63% of the high-mercy jurors said they had experienced those emotions. Thus, while merciful jurors may be just as frightened of the defendant as are merciless jurors, or find him just as unlikeable, they are nonetheless less likely to find him repulsive, and more likely to find sympathy for him.

3. Thinking About the Defendant's Punishment

The final comparison focuses on the considerations the jurors said were important to them in deciding the defendant's punishment. Jurors were presented with a list of such considerations and asked to rank each of them on a one to four scale, with one indicating "not at all important" and four indicating "very important." The mean response for each group of jurors is presented in Table 5.

Table 5.
How important were the following considerations for you in deciding what
defendant's punishment should be?
(means displayed on 1 [not at all important] to 4 [very important] scale)

	Mercy Score			n	p-value
	Low	Middle	High		
Desire to see the law enforced	3.93	3.65	3.58	197	0.004
Desire to see justice done	3.86	3.65	3.37	198	0.001
Vicious or brutal manner of the killing	3.77	3.67	3.55	197	0.011
Desire to apply the law correctly	3.75	3.75	3.76	198	0.572
Keeping defendant from ever killing again	3.70	3.13	3.08	198	0.000
Feelings about what such crimes deserve	3.58	3.45	3.35	197	0.109
Pain and suffering of the victim	3.54	3.40	2.95	198	0.001
Weight of aggravating and mitigating circumstances	3.26	3.27	3.29	198	0.919
Loss and grief of the victim's family	3.21	3.18	2.79	198	0.031
Keeping other people from killing	2.71	2.33	1.88	164	0.002
Desire to avoid deliberately killing someone	2.51	2.36	2.39	198	0.493
The principle of an eye for an eye	2.42	2.05	1.47	198	0.000
Desire to avoid a horrible mistake	2.16	2.31	2.11	197	0.920
Sentences imposed for similar crimes	2.07	1.96	1.47	198	0.013
Goal of rehabilitation	2.02	2.22	2.37	198	0.115
Punishment wanted by the victim's family	1.96	1.87	1.76	195	0.553
Community outrage over this crime	1.93	1.81	1.61	197	0.076
Punishment wanted by most members of the community	1.87	1.49	1.29	196	0.003
Sentences imposed on similar defendants	1.86	1.83	1.37	197	0.036
Feelings of compassion or mercy for defendant	1.77	2.15	2.57	198	0.001
Belief that defendant should have a chance to pay for the crime and become a law abiding citizen	1.65	1.82	1.89	198	0.288
Lingering doubts about the defendant's guilt	1.42	1.49	1.53	198	0.572
Feelings of vengeance or revenge	1.40	1.44	1.11	198	0.128

Note—Significance levels are based on Kendall's tau.

A number of the differences between the responses of the high- and low-mercy groups reached statistical significance. For example, while high-mercy jurors, like

low-mercy ones, considered it important to enforce the law or see justice done, on average they found it less important. Similarly, while high-mercy jurors placed importance on the nature of the killing, on the pain and suffering of the victim, and on the need to keep the defendant from ever killing again, they placed less importance on these considerations compared to their low-mercy counterparts. Moreover, while feelings of compassion for the defendant ranked tenth among the considerations important to high-mercy jurors, it was twentieth on the scorecard of low-mercy jurors. Thus, when high-mercy jurors embark on the task of deciding what the defendant's punishment should be, they do so with a frame of mind quite different, and more merciful, than that of their low-mercy peers.

The analysis so far suggests that the population of capital jurors includes some who are more merciful and some who are less merciful than the others. Moreover, the members of these different groups have thoughts, feelings and beliefs that distinguish them from one another. But what, if anything, accounts for the fact that a juror finds him- or herself in one group rather than the other? In other words, who is the merciful juror?

D. *Who is the Merciful Juror?*

The CJP survey collected a variety of demographic information about each of the jurors interviewed. Information was collected, for example, on a juror's race, gender, and age. In addition, jurors were asked about their educational background and their religious practices. Do any of these demographic characteristics help account for the fact that a juror belongs to the high-mercy group or the low one?

In order to answer this question, we constructed a series of models using multiple regression. Multiple regression is a statistical technique that allows one to isolate the relationship between one variable and another variable while holding constant, or controlling for, the influence of other variables.⁶⁰ The focus here is on the relationships, if any, between each of a number of demographic variables and the variable we have been using to measure mercy. In the language of multiple regression, mercy is the dependent variable and the demographic characteristics described above are the independent or explanatory variables. The mercy variable is, in other words, that which depends on the demographic variables, and the demographic variables are those which we will be using to try to explain or account for the fact that a juror is more or less merciful. The models are presented in Table 6.

Each model uses a different arrangement of independent variables. The table reports two figures for each of the independent variables they contain. The top figure is the called the coefficient. The bottom figure (in parentheses) is the p-value. For

⁶⁰ The regression models reported in Table 6 use ordered probit regression because the dependent variable is ordered, as opposed to being either continuous or categorical. For a discussion of ordered probit regression, see WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* § 19.6, at 849–57 (4th ed. 1999). The results remain substantially the same when reproduced using either ordered logit regression or ordered ordinary least squares regression.

present purposes, the coefficient is important because it shows the direction of the relationship between the independent variable and the dependent variable. The p-value is important because it shows the statistical significance of the relationship between these two variables. For example, the race variable, coded 0 = white juror and 1 = black juror, has a negative coefficient (-0.080) in Model 1, which means that black jurors are, controlling for the other variables in the model, less likely to be merciful compared to white jurors. However, the corresponding p-value indicates that the association between the race variable and the mercy variable is insignificant ($p = 0.678$). In other words, we cannot reject the hypothesis that the association between race and mercy reflected in the model is nothing more than the product of chance.

Table 6.
Regression Models of Mercy

	Model 1	Model 2	Model 3	Model 4
Race (0 = white, black = 1)	-0.080 (0.678)		-0.079 (0.686)	-0.118 (0.555)
Gender (0 = male, 1 = female)	-0.066 (0.687)		-0.047 (0.777)	-0.069 (0.683)
Age (years)	-0.010 (0.188)	-0.009 (0.245)	-0.009 (0.196)	-0.010 (0.151)
Education (1–6 scale)	0.115* (0.060)	0.113* (0.065)		0.111* (0.069)
Religiosity (1–7 scale)	0.110** (0.015)	0.107** (0.018)	0.108** (0.015)	0.113** (0.014)
Black male (1 = yes)		-0.382 (0.237)		
Black female (1 = yes)		0.264 (0.229)		
White male (1 = yes)		0.166 (0.327)		
High school education only (1 = yes)			-0.561*** (0.002)	
Baptist (1 = yes)				-0.003 (0.990)
Southern Baptist (1 = yes)				-0.047 (0.834)
Methodist (1 = yes)				0.249 (0.240)
Observations	196	196	196	196

p-values in parentheses

* significant at 10%; ** significant at 5%; *** significant at 1%

Note—Models are based on ordered probit regression. The dependent variable is the juror's score on the mercy scale (coded from one to ten).

Indeed, looking at the list of demographic characteristics included in Model 1, neither race, gender, nor age bears any significant association with mercy. Only education and religiosity achieve statistical significance. The variable reflecting a juror's education was coded on a scale ranging from one (juror had not finished high school) to six (juror had attended graduate or professional school). The positive sign on the education variable's coefficient indicates that the more education the juror received the more merciful the juror was likely to be, with the corresponding p-value indicating that the relationship approaches statistical significance ($p = 0.060$).

The variable reflecting a juror's religiosity was based on a question that asked how frequently the juror attended religious services. The variable took on recoded values ranging from one (juror never attended religious services) to seven (juror attended more than once a week). Once again, the positive sign on the coefficient indicates that jurors who more regularly attended religious services were more likely to be merciful than those who attended less regularly or not at all, with the p-value indicating a statistically significant relationship ($p = 0.015$). So, while a juror's race, gender and age may have nothing to do with the chances of the juror being merciful, education and religiosity apparently do.

Models 2 through 4 further explore the relationship between a juror's demographic profile and mercy. Model 2 looks more closely at the interaction between race and gender, using so-called dummy variables that combine race and gender. For example, the coefficient for the black male variable shows that black men, in comparison to other jurors, are less likely to be merciful, but the p-value indicates that this relationship lacks statistical significance. In fact, none of the dummy variables combining race and gender achieves statistical significance, thus reinforcing the conclusion of Model 1 that race and gender have little, if anything, to do with a person's being merciful or not.

Model 3 looks more closely at the influence of education on mercy. It focuses in particular on those jurors whose education ended at high school. The high school-only variable compares jurors who received a high school education or less with jurors who went on to receive some education beyond high school, controlling for the influence of the other variables in the model. The negative coefficient indicates that jurors who only received a high school education or less were more likely to fall into the low-mercy group compared to those who received some post-high school education, with the relationship between the high school-only variable and the mercy variable reaching significance at $p = 0.002$.⁶¹ Thus, either education after high school tends to make jurors more merciful, or jurors who are more merciful tend to pursue education after high school.

⁶¹ The mean mercy score for those with a high school education or less was 4.04 on a scale of one to ten. The mean score for those who received some schooling beyond high school, either in technical school or college, but who did not graduate from college was 5.52, and the mean score for those who graduated from college or who attended graduate or professional school was 5.66. The largest "mercy gap" therefore exists between those with only a high school education and those who received an education beyond high school.

Model 4 looks more closely at the influence of religion on mercy, adding three variables that control for denominational affiliation. Among the jurors interviewed in South Carolina, 62% belonged to one of three religious denominations. Twenty-seven percent identified themselves as Baptist, 18% as Southern Baptist, and 17% as Methodist. Model 4 adds membership in one of these three religious denominations to the basic model. While none of the denominational variables achieves significance, the significance of the original religiosity variable persists. Thus, while going to church is associated with mercy, the church to which one goes apparently is not.⁶²

The more merciful of our jurors thus tend to be those who are more educated and those who are more consistent about attending religious services. These jurors are, as we saw earlier, also more likely to sympathize with the defendant and to place greater importance on their compassion for him when deciding his punishment. But does this greater sympathy and compassion translate into a greater likelihood, all else being equal, of voting for life instead of death?

E. *Does Mercy Matter?*

One naturally expects that a merciful juror would be more likely to vote for life instead of death than would one lacking mercy. In order to test this hypothesis, we focus on the first vote the jurors cast during the jury's penalty phase deliberations. Focusing on a juror's first vote, and not the jury's final vote, isolates the voting behavior of each individual juror. The final verdict of the jury will inevitably reflect the influence of deliberations and group dynamics, thereby obscuring the influence of each juror's own individual disposition.

Table 7 shows the proportion of jurors within each mercy group who were undecided on the first ballot, who cast their first vote for life, and who cast their first vote for death.

⁶² We also explored separate regression models in which the dependent variable was each component of the combined mercy variable. In other words, these models used each of the mercy variables in Table 1, Panel A as the dependent variable, together with the same set of explanatory variables in Table 6. The direction of the religiosity and education effects is consistently the same as that reported in Table 6. The magnitude and significance of the effect varies, with Panel A's third variable ("If the defendant wanted mercy . . .") yielding the strongest and most significant effects regarding religiosity and education.

Another potential concern is that a juror's attitude toward mercy is a simple function of the facts of the case on which he or she served. As explained above, this possibility seemed more likely with respect to the questions in Table 1, Panel B than with respect to those in Panel A. Nevertheless, individual case characteristics could influence juror responses to Panel A questions. In order to test whether the religiosity and education effects reported in Table 6 depended on individual case characteristics, we explored models in which we used two case characteristics (juror assessments of the viciousness of the crime and the remorse of the defendant) as additional explanatory variables. The results of these models did not materially differ from those reported in Table 6.

Table 7.
Juror First Vote and Mercy

	Mercy Score		
	Low	Middle	High
Life	9%	37%	44%
Undecided	11%	12%	11%
Death	80%	50%	44%
n	55	103	38

Note.—The significance level is $p = 0.0001$ based on Kendall's tau.

The results are statistically significant and produce the pattern one might expect. Among low-mercy jurors, only 9% cast their first vote for life, compared to 44% among the high-mercy jurors. In contrast, 80% of the low-mercy jurors cast the first vote for death, compared to only 44% of the high-mercy jurors. All in all, therefore, merciful jurors do in fact seem more likely to vote for life over death. In order to explore in more detail the influence of mercy on a juror's first vote, controlling for the influence of other variables likely to influence that vote, we need once again to employ regression analysis.

An earlier analysis of the South Carolina CJP jurors discovered that several variables are associated with a juror's first vote.⁶³ Among the available demographic variables, this earlier analysis found that black jurors were more likely to cast their first vote for life than white jurors,⁶⁴ that jurors who identified themselves as Southern Baptist were less likely to vote for life than were jurors who belonged to other religious denominations,⁶⁵ and that jurors who strongly supported the death penalty were less likely to vote for life than jurors who supported it less strongly.⁶⁶ Among the variables related to the crime, the more a juror characterized the crime as vicious, the less likely he or she was to vote for life on the first ballot,⁶⁷ and among the variables related to the defendant, a juror who believed the defendant was remorseful was more likely to vote for life.⁶⁸ Finally, the less time a juror believed a defendant not sentenced to death would remain in prison before being released, the less likely he or she was to vote for life.⁶⁹

This last variable—estimated release time—requires some additional discussion. Jurors were asked to give an estimate of how long they thought the defendant would

⁶³ See Eisenberg et al., *Forecasting*, *supra* note 47, at 284–94.

⁶⁴ See *id.* at 298.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See *id.* at 300–01 tbl.6

⁶⁸ See *id.*

⁶⁹ See *id.*

remain in prison if he was not sentenced to death. Most of the jurors interviewed in South Carolina responded with a particular figure, which ranged from a low of four years to a high of sixty years. Some of the jurors, however, said they had no idea how long the defendant would remain in prison, while others said they believed the defendant would remain in prison for the rest of his natural life. In order to account statistically for the responses of these two groups of jurors, we used two different approaches.

One approach (reflected in Models 1 and 2) created a separate variable (release time estimate = missing) for those jurors who said they had no idea how long the defendant would remain in prison, and recoded the numerical estimates of all the other jurors on a scale ranging from one to seven, with the jurors who said the defendant would remain in prison for the rest of his life coded as seven. The second approach (reflected in Models 3 and 4) again created a separate variable (release time estimate = missing) for those jurors who said they had no idea how long it would be before the defendant would be released, and another separate variable for those jurors who said the defendant would never be released (release time estimate = life). The actual estimate in years was used for the rest of the jurors who provided such an estimate. The results are presented in Table 8.⁷⁰

The first pair of models (Models 1 and 2) employ the first approach to the release estimate variables, while the second pair (Models 3 and 4) employ the second. The first model in each pair is the basic model, which excludes the variable reflecting a juror's mercy score. The second model in each pair then adds the mercy variable in order to evaluate the effect, if any, of mercy on the basic model. All of the variables previously found to be associated with a juror's first vote achieve significance or (in one instance) near significance in all the models reported here. Moreover, and more importantly for present purposes, the mercy variable is highly significant in both models in which it appears. The higher a juror's mercy score the less likely he or she was to cast a first vote in favor of death, controlling for all the other variables previously shown to be associated with a juror's first vote. Thus, mercy does matter, not only for how a juror thinks and feels, but also for how he or she votes, at least on the first ballot.⁷¹

⁷⁰ The models reported in Table 8 use ordered probit regression. *See supra* note 60. The results remain substantially the same when reproduced using ordered logit regression.

⁷¹ We also explored separate regression models, otherwise the same as the models reported in Table 8, using each component of the combined mercy variable. *See supra* note 62. The direction of the mercy effect in these additional models is consistently the same as that reported in Table 8. Two of the three component variables were highly statistically significant. The third ("If the defendant wanted mercy . . .") was statistically insignificant.

We also note that models using various measures of mercy as an explanatory variable may suffer from an "endogeneity" problem. In other words, a juror's expressed attitude towards mercy may not solely be a function of factors exogenous to the sentencing outcome. Consequently, a "system of equations" may be the best way to model the sentencing outcome. Such an approach uses two equations, one which models the sentencing outcome and one which models mercy, and then solves those equations simultaneously. *See Eisenberg et al., But Was He Sorry?*, *supra* note 47, at 1637. We leave these difficult modeling problems for another day.

Table 8.
Regression Models of Juror First Vote

	Model 1	Model 2	Model 3	Model 4
Mercy score (1–10 scale)		-0.155*** (0.000)		-0.152*** (0.000)
Race (0 = white, 1 = black)	-0.733*** (0.007)	-1.057*** (0.000)	-0.738*** (0.007)	-1.042*** (0.000)
Southern Baptist (0 = no, 1 = yes)	0.688** (0.016)	0.726** (0.027)	0.671** (0.019)	0.705** (0.029)
Viciousness of the crime (1–4 scale)	0.440*** (0.009)	0.408** (0.022)	0.451*** (0.008)	0.423** (0.016)
Remorse of the defendant (1–4 scale)	-0.263*** (0.007)	-0.222** (0.028)	-0.268*** (0.006)	-0.230** (0.022)
Appropriateness of death penalty (1–5 scale)	0.394*** (0.008)	0.333** (0.017)	0.390*** (0.009)	0.334** (0.016)
Release time estimate (1–7 scale)	-0.103** (0.037)	-0.146*** (0.008)		
Release time estimate = missing (1 = missing)	0.023 (0.957)	0.027 (0.955)	0.127 (0.756)	0.177 (0.691)
Release time estimate (years)			-0.014 (0.120)	-0.019** (0.044)
Release time estimate = life (1 = life)			-0.843* (0.066)	-1.032** (0.043)
Observations	203	191	203	191

p-values in parentheses

* significant at 10%; ** significant at 5%; *** significant at 1%

Note—Models are based on ordered probit regression. The dependent variable is the juror's first vote (coded 1 = life, 2 = undecided, 3 = death).

IV. CONCLUSION

Philosophers are unlikely to reach agreement any time soon on mercy's moral status, nor is the Court likely to address, let alone decide, mercy's constitutional status within the penalty phase. But perhaps we at least have a better understanding of how mercy functions empirically in capital sentencing. Some capital jurors are, it seems, simply more merciful than others, with patterns of thought and feeling rendering them distinct from their less merciful counterparts. These jurors are, in addition, apt to be better educated and to attend religious services more regularly. Last, but surely not least, they are more likely to vote for life over death.

